Filed 2/21/19 Emmerling v. City of Mountain View CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NICHOLAS W. EMMERLING, Plaintiff and Appellant, v. THE CITY OF MOUNTAIN VIEW, Defendant and Respondent.	H044521 (Santa Clara County Super. Ct. No. 1-15-CV280920)

Nicholas W. Emmerling sued the City of Mountain View (City) after the Mountain View Police Department (Department) terminated him from his position as a probationary police officer. Emmerling alleged employment discrimination, retaliation, and related causes of action. He appeals a judgment entered in favor of the City following the trial court's grant of summary judgment.

The primary issue on summary judgment concerned the Department's motive for terminating Emmerling's employment. Emmerling, a reservist in the California Army National Guard, contends that he was fired because he requested and took time off for protected military and family leave. The City counters that Emmerling was fired because he failed to engage in an acceptable level of "self-initiated activity" in the form of self-initiated arrests after his supervisors advised him to increase such activities.

We determine that Emmerling has presented evidence sufficient to create a triable issue of material fact as to whether the Department fired him for requesting and taking military leave. Therefore, the judgment must be reversed and the matter remanded for further proceedings. As to Emmerling's claim of retaliation for taking family leave, we conclude that he failed to present sufficient evidence to avoid summary adjudication.

I. FACTS AND PROCEDURAL BACKGROUND[1]

The Department hired Emmerling as a reserve (part-time) police officer in September 2008. He enlisted in the California Army National Guard in January 2009, and he was deployed to Iraq in August 2009. The Department granted him leave for one year until August 2010, after which he returned to his position as a reserve officer. The Department never denied him any request for military leave while he was employed as a reserve officer.

In early 2012, Emmerling applied for a position as a full-time police officer with the Department. Sergeant Peter De La Ossa, one of Emmerling's supervisors in the personnel department, warned him to downplay his military experience during the interview. Sergeant De La Ossa told Emmerling that the Department had a history of not promoting or hiring active military members based on their lack of commitment to their "real" jobs with the Department.[2]

---

[1] These facts are taken from the parties' statements of undisputed facts; Emmerling's complaint, declaration, and deposition; and other documents where indicated. The objective circumstances of Emmerling's employment and termination were largely undisputed. As explained below, the central factual dispute concerned the Department's motive for terminating Emmerling.

[2] Emmerling asserted in his declaration and deposition that Sergeant De La Ossa made these statements to him. The City objected on grounds of hearsay and lack of personal knowledge, but the trial court declined to rule on the objections, preserving them for appeal. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532.) The City renews the hearsay objection on appeal. We conclude the statement is admissible as an authorized admission because Sergeant De La Ossa was authorized to speak about the hiring process. (Evid. Code, § 1222, subd. (a)). Accordingly, we overrule the City's objection.

In Emmerling's final interview with the Chief of Police, the Chief asked Emmerling about his military commitment. Based on Sergeant De La Ossa's advice, Emmerling "downplayed it" and responded that he had no intention to re-enlist once his enlistment was up because he wanted to make a career at the Department.

The Department hired Emmerling as a full-time officer in November 2012 with the requirement that he complete an 18-month probationary period before obtaining permanent status. Emmerling took 260 hours of leave for military duties during the 18-month probationary period. He took the two longest consecutive periods of military leave for annual trainings around August 2013 and April 2014. He also took approximately 40 hours of family leave in March 2013 and 50 hours of family leave in September 2013.

The Department regularly issued written evaluations of Emmerling's performance throughout the probationary period. The evaluations generally described his performance in positive terms and rated him as acceptable overall. The reports contain numerous positive comments emphasizing his "proactive work ethic"; "a desire to be proactive"; "a good work ethic"; and describing him as "a pro-active officer [who] continuously seeks out crime," among other comments.

Several reports, however, criticized Emmerling for performing inadequately by failing to execute a sufficient number of self-initiated arrests despite his supervisors urging him to increase such arrests.[3] For example, an evaluation issued in April 2013 stated that Emmerling "consistently looks for, although not always successfully, traffic stops between calls for service. I feel that his number of subject contacts isn't as high as it could be because Emmerling looks for a particular type of violation, and sometimes misses other opportunities." The authoring supervisor encouraged Emmerling "to

[3] Emmerling presented evidence contradicting the Department's factual assertions on this point, as set forth below in section II.B.2.

investigate further whenever he has the slightest suspicion, and to always look for an opportunity to 'make something out of nothing.' " Another evaluation issued in early 2014 stated that Emmerling had made no self-initiated arrests during the preceding seven-week period. The authoring supervisor stated he had discussed this problem with Emmerling. One evaluation observed, "It should be noted that Officer Emmerling's self-initiated performance was lower this month as compared to last month due to his military commitment and the fact he only worked 8 out of the 17 possible shifts."

Another evaluation in October 2013 stated, "Officer Emmerling is performing at an acceptable level in all categories and is one of the more proactive officers on the team. Officer Emmerling has taken a large amount of time off for his military training commitment and some personal leave. I mention the absences because of his tenure and it's possible that his statistical information may reflect it."

In March 2014, Emmerling notified his supervisor, Sergeant Michael Soqui, that Emmerling was due for a two-week period of military leave. Emmerling also informed his superiors that his wife was expecting a child in July 2014, and he would need to take family leave. Sergeant Soqui sent an email to his own superiors informing them that the Department would "probably need to post [overtime] when Emmerling is off."

In several emails, Emmerling's supervisors discussed extending his probationary period to compensate for the periods of leave. Under a Memorandum of Understanding between the City and the Mountain View Police Officers' Association, the Department could extend an employee's probationary period to compensate for time lost due to authorized leaves of absence.

In April 2014, one supervisor emailed another supervisor, Lieutenant Frank St. Clair, stating, "Emmerling is currently on military leave for a few weeks and then may begin his FMLA time. I would recommend extending his probation to cover the amount of time he will be on leave and unevaluated." Lieutenant St. Clair responded, "I agree . . . how do we do that??? Hahahaha."

Lieutenant St. Clair then emailed another supervisor as follows: "Looking at extending Emmerling's probation, HR says it can be done but is not sure it will give us enough time to address our concerns. He has 2 months left and has missed 250 hours for military leave and 60 for attending classes, which could potentially give us 2 more months possibly less if we can only look at the 80 hours blocks as defined in our MOU.[4] [¶] My concern is the paper trail is not there. Despite not making a proactive arrest for 9 months, he has been rated as acceptable for his self-initiated activity. He is also rated as acceptable or above in every other category. So there is no going back and moving forward, we would need to heavily document and train his deficiencies." In April 2014, the Department notified Emmerling it was extending his probationary period by 33 days.

In May 2014, Sergeant Soqui issued a performance evaluation rating Emmerling's "overall self-initiated activity" as "unacceptable." The report stated he had made only one self-initiated misdemeanor arrest, zero self-initiated warrant arrests, and zero self-initiated felony arrests for the month of April. The report further stated Emmerling had "plenty of time to complete self-initiated investigations." Apart from these statements concerning self-initiated activity, the evaluation described Emmerling's performance positively.

Sergeant Soqui later held a conversation with Lieutenant St. Clair concerning Emmerling's performance during a 36-hour period of duty covering three shifts in early May 2014. Sergeant Soqui told Lieutenant St. Clair that Emmerling had made no reports, citations or stops; did not contact anyone; and had "made no effort to be a proactive officer" during this period.

The Department terminated Emmerling's employment in late May 2014 (two months after he notified the Department of his need to take additional military leave).

---

[4] "MOU" apparently refers to the Memorandum of Understanding between the City and the Mountain View Police Officers' Association.

The Department asserted that Emmerling was terminated because he failed to engage in an acceptable level of self-initiated activity after being warned on multiple occasions that self-initiated activity was "critical to his successful performance" and after having been counseled on "how to engage in it."

Emmerling's complaint alleged four causes of action: discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Govt. Code, §§ 12900 et seq.); retaliation in violation of the FEHA (*Ibid.*); retaliation in violation of the California Family Rights Act (CFRA) (Govt. Code, § 12945.2); and discrimination in violation of the Military and Veterans Code (Mil. & Vet. Code, §§ 394, 395, & 564).

The City moved for summary judgment, or in the alternative, summary adjudication. The trial court granted summary judgment on all four causes of action and entered judgment in favor of the City. Emmerling timely appealed the judgment.

II. DISCUSSION

Emmerling raises both evidentiary claims and substantive claims on appeal. First, he contends that the trial court erred by excluding evidence from other military service members who described similar discrimination by the Department. Second, Emmerling argues the trial court erred by granting summary judgment because substantial evidence shows the Department terminated him for taking protected military and family leave, and its justification for doing so was pretextual. As explained further below, we agree that the trial court erred in its evidentiary rulings and in granting summary adjudication of Emmerling's claims that the Department terminated him for taking protected military leave. We reject Emmerling's contentions related to the trial court's summary adjudication of his claims involving family leave. We consider the evidentiary claims first.

A. *Evidentiary Rulings*

Emmerling contends the trial court erred by excluding multiple sources of so-called "me too" evidence—i.e., evidence pertaining to the experience of other military

reservists who described similar discrimination by the Department. The City argues the court properly excluded this evidence as hearsay, lacking in foundation, and insufficiently similar to Emmerling's allegations ("improper 'me too' evidence"). We conclude the trial court erred by excluding statements demonstrating animus by Department supervisors.

1. Factual Background

As evidence that the Department harbored discriminatory animus toward police officers currently serving in the military, Emmerling offered declarations and deposition testimony from four other military reservists who worked as police officers in the Department: Eilaine Longshore, Ranjan Singh, Frank Rivas, and Spencer Lawrence-Emanuel. Their statements alleged adverse treatment by the Department as compared to non-reservist counterparts. The statements also described comments and remarks by supervisors evidencing animus against military reservists.

First, Emmerling offered a declaration by Eilaine Longshore, who worked as a police officer for the City while serving as an Army reservist. Longshore alleged that, during an interview for a School Resource Officer position, a supervisor asked her whether her military commitments would prevent her from performing the job. She alleged that the position was given to a non-reservist instead. She then applied for a detective position and was again asked whether her military commitments would interfere with her job. The position was again given to a non-reservist. She claimed she was told by a supervisor that her "outside commitments are a concern" and she had not demonstrated her "dedication" to the Department. After she resigned from the military, she was hired for the detective position she had previously applied for.

Second, Emmerling offered portions of deposition testimony by Army reservist Ranjan Singh. Singh testified that he was denied a position on the Department's bicycle patrol team after a year of military deployment. Singh alleged a supervisor told him that "you've been gone and we don't have a lot of evaluations to base your work habits or

ethic . . . off of." Singh testified that five persons were selected for the bicycle team, and none was a member of the military. Singh also testified that he was passed over for a position on the Department's SWAT team, despite his SWAT experience as a military policeman. Singh opined that "the department likes ex-military, not current. And I think that's just kind of the understanding everyone has."

Third, Emmerling offered portions of deposition testimony by reservist Frank Rivas. Rivas testified that, after he was passed over for a position on the SWAT team, a supervisor told him he was not chosen for SWAT "because of how much [Rivas was] gone." Rivas's boss told him "the thought among supervisors" was that Rivas needed to decide whether he wanted to "play Army or be a police officer." On another occasion, after Rivas informed a superior (Lieutenant Greg Oselinksy) that he (Rivas) would have to miss a training day to perform reserve service, Lieutenant Oselinksy asked him if he had to leave for that "gay military stuff" or "homo military stuff." On another occasion, Sergeant De La Ossa told Rivas "as long as [he was] in the [military] reserves, [he] probably wouldn't get promoted . . . ."

Fourth, Emmerling offered a declaration from Spencer Lawrence-Emanuel, a Reconnaissance Marine in the Marine Corp Reserves. Lawrence-Emanuel stated that the Department terminated him without any warning or counseling two weeks after he informed the Department he would be taking military leave. He was given no explanation for his firing other than being told he was not "a good fit" with the Department. At one point during his probationary period, Sergeant Michael Soqui—who was also responsible for evaluating Emmerling's performance as of February 2014—made a derogatory comment about Lawrence-Emanuel's leave. Sergeant Soqui stated something to the effect of "Spencer's going on vacation next week" even though Sergeant Soqui knew Lawrence-Emanuel was taking military leave.

2. Procedural Background

The City lodged a large number of objections to this evidence on a line-by-line basis. Generally, the City lodged multiple objections to each statement on the grounds that the statements were hearsay and double hearsay; lacking in personal knowledge; speculative; irrelevant and immaterial; and improper "me too" evidence because the statements lacked a sufficient degree of similarity to Emmerling's allegations.

The trial court sustained 27 of the City's objections without stating the basis for any specific ruling. The court declined to rule on the remaining objections, which numbered in the hundreds. Although the court did not set forth the grounds for any specific ruling, in its written order the trial court referenced the "me too" evidence and stated, "the declarations and deposition testimony submitted by Plaintiff are the subject of the City's evidentiary objections that were sustained . . . by the Court." In finding that Emmerling failed to set forth substantial evidence of pretext, the court's ruling stated that "the factual circumstances involving these other officers differs from Plaintiff in this case. For example, the deposition testimony from Officer Frank Rivas fails to show that any adverse employment action was taken against him because of military leave. Thus, this evidence also falls short of showing that the City acted with any discriminatory animus against the Plaintiff."

3. Standard of Review

The parties dispute the standard of review for evidentiary rulings on summary judgment. The City contends the weight of authority favors an abuse of discretion standard. As Emmerling points out, however, the California Supreme Court has declined to set forth a standard. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 (*Reid*).) He argues we should review the trial court's evidentiary rulings de novo. Prior rulings of this court have reasoned that de novo review is the appropriate standard because the trial court's rulings "were determined on the papers and based on questions of law." (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451.) We need not decide the question here, because we would find the trial court erred under either standard of review. As to

objections on which the trial court failed to rule, "it is presumed that the objections have been overruled, the trial court considered the evidence in ruling on the merits of the summary judgment motion, and the objections are preserved on appeal." (*Reid, supra,* 50 Cal.4th at p. 534.)

4. Evidence Relevant to Pretext

Emmerling contends that the trial court erred by sustaining the City's objections and by failing to consider the proffered statements as sufficient evidence of pretext. The City maintains that the court properly excluded this evidence as hearsay, lacking in foundation, and insufficiently similar to the facts of Emmerling's case. The City argues that Emmerling failed to show the other reservists were similarly situated because they did not suffer adverse employment actions, and the decision-makers in charge of their employment were not the same supervisors involved in Emmerling's termination. Emmerling characterizes the City's objections as "scatter-shot," thereby providing "no clear basis for the trial court's ruling." He further contends the reservists' statements were admissible as discriminatory remarks (also called "stray remarks") demonstrating animus against reservists by Department supervisors.

Under California law, discriminatory remarks may be relevant to show animus, even when uttered by a non-decision-maker. (*Reid, supra,* 50 Cal.4th at p. 539.) "Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered. Thus, a trial court must review and base its summary judgment determination on the totality of evidence in the record, including any relevant discriminatory remarks." (*Id.* at p. 541.) As set forth below, such evidence does not require a hearsay exception when out-of-court statements are not offered for the truth of the matter. That is, discriminatory remarks may be

admitted to show a supervisor's discriminatory state of mind and not to prove the literal truth of the relevant statement. Here, the relevance of discriminatory remarks would be to show that the Department harbored animus against officers currently serving in the military.

At least two of the statements offered by fellow reservists were relevant under this theory. First, Spencer Lawrence-Emanuel stated that Sergeant Soqui made a derogatory comment about Lawrence-Emanuel's leave service—something to the effect of, "Spencer's going on vacation next week." Sergeant Soqui was responsible for evaluating Emmerling's performance as of February 2014, and Sergeant Soqui authored the May 2014 performance evaluation that rated Emmerling's "overall self-initiated activity" as "unacceptable."

The City objected on multiple grounds to Lawrence-Emanuel's "going on vacation" statement. The pertinent objections included hearsay, relevance, and "improper 'me too' evidence." The trial court excluded the testimony but did not set forth grounds or cite any particular objection in its ruling.

In support of its objection below on "improper 'me too' " grounds, the City cites *Schrand v. Federal Pacific Elec. Co.* (6th Cir. 1988) 851 F.2d 152, 156 (*Schrand*). But *Schrand* is inapposite. In *Schrand*, the Court of Appeal held reports of discriminatory statements to be irrelevant where the reports were made by employees who were working in completely different offices than the plaintiff—i.e., employees who were "working in places far from the plaintiff's place of employment, under different supervisors." (*Ibid*.) Here, by contrast, the derogatory comment was made by a supervisor in the same department who authored a critical performance evaluation of Emmerling.

We conclude Lawrence-Emanuel's statement was admissible as evidence of discrimination under *Reid, supra*, 50 Cal.4th 512. The statement was relevant as evidence of animus towards reservists by Sergeant Soqui, who authored a critical performance evaluation just before Emmerling was fired, and the statement was not

hearsay because it was not offered for its truth. The evidentiary value of the statement to Emmerling's complaint is precisely that the statement was *not* true. Sergeant Soqui's characterization of military leave as "vacation" is relevant to animus because military leave is not vacation.

Similarly, after Frank Rivas told Lieutenant Oselinsky that Rivas would miss a day of training to perform reserve service, Lieutenant Oselinsky asked Rivas if he had to leave for that "gay military stuff" or "homo military stuff." Lieutenant Oselinsky was in charge of training before Lieutenant St. Clair took over, and Lieutenant Oselinsky was one of the officers who had reviewed Emmerling's performance evaluations.

The City objected on multiple grounds to several portions of Rivas's deposition, including the "gay military stuff" or "homo military stuff" testimony described above. The pertinent objections argued by the City included hearsay, relevance, and "improper 'me too' evidence." The trial court excluded the testimony but did not set forth grounds or cite any particular objection in its ruling. We conclude that the statement is admissible, because it is is relevant as evidence of animus by one of Emmerling's supervisors, who was involved in evaluating Emmerling's performance, and the statement was not offered for its truth. It therefore does not constitute hearsay. We conclude the trial court erred by excluding this evidence.[5]

We recognize that, under *Reid,* the admissibility of the declarations containing statements made by Sergeant Soqui and Lieutenant St. Clair also depends on the particular facts of the case and the strength of the other evidence elicited. (See *Reid, supra,* 50 Cal.4th at p. 545.) As *Reid* observed, "a slur, in and of itself, does not prove actionable discrimination." (*Id.* at p. 541.) Our conclusion that the trial court erred in

[5] We take no position on the other evidence previously excluded by the trial court. Upon appropriate request by one or more of the parties, the trial court should reconsider the admissibility of the evidence it previously excluded and on which we have not ruled here in light of the above analysis

excluding these statements is bolstered by the other evidence proffered by Emmerling, which we discuss further below. As we will explain, the evidence related to pretext described above, considered with other evidence Emmerling presented, is sufficient to create a triable issue of material fact as to whether the City's decision to terminate Emmerling in fact resulted from discriminatory animus.

B. *The Trial Court's Grant of Summary Judgment*

Emmerling appeals the judgment entered in favor of the City following the trial court's grant of summary judgment on all four causes of action. He contends that he put forth substantial evidence supporting a prima facie case that the City terminated his employment because he took protected military and family leave. The City argues that these claims are unsupported by substantial evidence and that the record instead shows the Department had legitimate, nondiscriminatory motives to terminate Emmerling. Specifically, the City argues that the evidence shows Emmerling was fired due to his lack of self-initiated activity and his failure to adhere to his supervisors' instructions to initiate such activity. Emmerling counters that substantial evidence shows this justification was pretextual.

Whether the trial court erred by granting a defendant's motion for summary judgment is a question of law we review de novo. (*Samara v. Matar* (2018) 5 Cal.5th 322, 338.) We must " 'independently examine the record to determine whether triable issues of material fact exist.' " (*Reeves* v. *Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106 (*Reeves*).)

"Because a summary judgment denies the adversary party a trial, it should be granted with caution. [Citation.] Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact." (*Johnson v. United Cerebral*

Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties (2009) 173 Cal.App.4th 740, 754 (*Johnson*).)

1. Legal Standards

a. The *McDonnell Douglas* Test

As pertinent to the first three causes of action, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, . . . , based on a theory of disparate treatment." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 354, (*Guz*), citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).) "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination." (*Guz,* at p. 354.)

In summary judgment proceedings, however, " 'the trial court will be called upon to decide if the plaintiff has met his or her burden of establishing a prima facie case of unlawful discrimination. If the employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. In short, by applying *McDonnell Douglas*'s shifting burdens of production in the context of a motion for summary judgment, "the judge [will] determine whether the litigants have created an issue of fact to be decided by the jury. . . ." ' ' "In other words, the burden is reversed in the case of a summary issue adjudication or summary judgment motion . . . ." ' [Citation.]" (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 150-151, fn. omitted.)

"Legitimate reasons are those 'that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination. [Citations.]' [Citation.] The employer's reasons 'need not necessarily have been wise or correct,' so long as they

were not discriminatory. [Citation.] Such a showing by the employer rebuts the presumption of unlawful discrimination, requiring the plaintiff-employee to come forward with evidence that the challenged treatment was in fact the product of an unlawful discriminatory motive. [Citation.]" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 754.)

"[W]hen the employer proffers a facially sufficient lawful reason for the challenged action, the entire *McDonnell Douglas* framework ceases to have any bearing on the case, and the question becomes whether the plaintiff has shown, or can show, that the challenged action resulted in fact from discriminatory animus rather than other causes." (*Reeves*, *supra*, 121 Cal.App.4th at p. 112.) In other words, here the question is whether Emmerling can show that the City's claim that it fired him due to his failure to engage in "self-initiated activity" was pretextual.

" '[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ' [Citations.] Circumstantial evidence of ' "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis. [Citations.] With direct evidence of pretext, ' "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." [Citation.] The plaintiff is required to produce "very little" direct evidence of the employer's discriminatory intent to move past summary judgment.' [Citation.]" (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 68-69, fn. omitted.)

b. Military and Veterans Code

Similar principles govern the fourth cause of action (discrimination in violation of the Military and Veterans Code). (*Flores v. Von Kleist* (2010) 739 F.Supp.2d 1236, 1258.) "To prevail on his [or her] claim, Plaintiff has the 'burden of showing, by a preponderance of the evidence, that his [or her] . . . [military service] was a substantial or

motivating factor in the adverse employment action; the employer may then avoid liability only by showing, as an affirmative defense, that the employer would have taken the same action without regard to the employee's [military service].' [Citation.] 'Whether an employer has the requisite discriminatory motive is a question of fact. Nonetheless, the Court may grant summary judgment if it finds there is no genuine dispute as to that fact . . . .' [Citation.]" (*Ibid.*)

2. First, Second, and Fourth Causes of Action—Discrimination and Retaliation Based on Military Leave

The first, second, and fourth causes of action alleged the City terminated Emmerling for taking protected military leave. The City does not dispute that Emmerling was in a protected class (the military); that he was qualified for the position of full-time police officer; that he suffered an adverse employment action; and that the taking of military leave was legally protected. The only matters of dispute concern the City's motives for terminating Emmerling's employment and whether the City's asserted nondiscriminatory justification—the lack of self-initiated activity—was pretextual. The merits of the City's summary judgment motion turn on the same disputed matters with respect to all three causes of action. Accordingly, we consider them together.

A defendant employer moving for summary judgment may prevail on its motion either by showing that the plaintiff cannot demonstrate a prima facie case or by setting forth admissible, competent evidence of legitimate, nondiscriminatory reasons for terminating the plaintiff's employment. (See *Guz*, *supra*, 24 Cal.4th at p. 360.) We conclude that Emmerling has established a prima facie case of discrimination based on his military service. During the application process for the position as a full-time officer, Sergeant De La Ossa advised Emmerling to downplay his military experience because the Department had a history of not promoting or hiring active military members based on their lack of commitment to their "real" jobs with the Department. In the final interview for the position, the Chief of Police explicitly asked about Emmerling's military

commitment, whereupon Emmerling responded that he had no intention to re-enlist once his current enlistment expired.

After the Department hired Emmerling on probationary status, he took a substantial amount—260 hours—of protected military leave during the probationary period. Emmerling's supervisors then discussed the possibility of extending his probationary period to compensate for his leave, prompting Lieutenant St. Clair to respond, "[H]ow do we do that??? Hahahaha." Lieutenant St. Clair then stated, "My concern is the paper trail is not there," and he added that "we would need to heavily document and train his deficiencies." The City points out that its Memorandum of Understanding with the Mountain View Police Officers' Association allowed for such probationary extensions for the taking of leave, which Emmerling does not dispute. But given the tenor of Lieutenant St. Clair's statements, a reasonable juror could infer that these remarks demonstrated animus in reaction to Emmerling's requests for military leave. The Department terminated Emmerling's employment two months after he notified the Department of his need to take additional military leave.

Turning to the City's contention that the Department had legitimate, nondiscriminatory reasons for terminating the Emmerling's employment, the City asserts that he failed to perform with an acceptable level of self-initiated activity despite his supervisors' instructions to do so. In support, the City puts forth several of Emmerling's performance evaluations that contain statements describing his low level of self-initiated activity and the need to improve his arrest numbers. The City thereby has presented admissible evidence that the Department terminated Emmerling due to his inadequate performance. Having presented admissible evidence that its decision to terminate Emmerling was based on legitimate, nondiscriminatory factors, the burden shifts to Emmerling to show substantial evidence that the City's decision to fire him was based on pretext or discriminatory animus, thereby raising a triable issue of material fact regarding the true reason he was fired. (See *Johnson*, *supra*, 173 Cal.App.4th at p. 756.)

We conclude that Emmerling has put forth substantial evidence showing the Department actually fired him for requesting and taking military leave. The record contains conflicting characterizations of Emmerling's performance, and he disputes the Department's factual claims regarding his level of self-initiated activity. The record shows the reports prior to May 2014 were generally positive and his performance was rated as acceptable. And several of Emmerling's supervisors' statements were belied by evidence showing he in fact made self-initiated arrests during the periods in question. As to Lieutenant St. Clair's April 2014 "paper trail" email claiming Emmerling had not made a proactive arrest in the prior nine months, Emmerling asserts that he made two self-initiated arrests in March 2014 and at least two self-initiated arrests in February 2014. Emmerling's assertions on this point are corroborated by his performance evaluations. A report covering March 2014 stated he made two self-initiated misdemeanor arrests, and a report covering February 2014 stated he made one self-initiated misdemeanor arrest and one self-initiated warrant arrest. In November 2013, another supervisor congratulated Emmerling for an arrest with an email stating, "Nice Pinch Nick!"

Emmerling also disputes the City's claim that he lacked self-initiated arrests around May 2014. He asserts that "[t]hroughout May 2014, I responded to many calls for service and engaged in significant self-initiated activity, including making numerous traffic stops, writing citations, and at least 5 self-initiated arrests. . . . [¶] . . . During my final weekend shift at MVPD, May 16 through May 18, 2014, I made 3 self-initiated arrests, at least 3 traffic stops, and was continuously engaging in other self-initiated activity like running vehicles' license plates." This evidence supports a reasonable inference that Emmerling's supervisors made multiple false statements concerning the extent of his self-initiated activity.

The City contends it does not matter whether the supervisors' claims were accurate, relying on *King v. United Parcel* Service (2007) 152 Cal.App.4th 426, 436 ("It

is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.") But this argument assumes that the employer's belief in the stated reasons was honest. Given the evidence in this record, a reasonable juror could infer otherwise.

Furthermore, the record shows that the Department had a more practical motive for discriminating against reservists. As Sergeant De La Ossa testified, "Scheduling is always a nightmare for making sure that we have the amount—the right amount of resources on the street." Sergeant De La Ossa went on to explain that this scheduling "nightmare" constituted a "sore spot" for the supervisor of another reservist (Frank Rivas) who had taken military leave. One of Emmerling's supervisors complained of the same problem, noting that as a result of Emmerling's request for leave in March 2014 the Department would "probably need to post [overtime] when Emmerling is off." The short lapse of time (two months) between Emmerling's notification that he would need to take additional leave for military service and his termination date provides additional support that the latter decision was a response to his request for leave. While we recognize the scheduling difficulties caused by military leave, the City points to nothing in the law permitting employers to treat reservists less favorably in response to such logistical complications.

In considering this evidence, the trial court erred by drawing inferences in favor of the City where a reasonable factfinder could have drawn an opposite inference in favor of Emmerling. For example, the trial court inferred that statements by his supervisors that inaccurately undercounted his self-initiated arrests were good-faith mistakes, whereas a reasonable factfinder could have found them to be evidence of animus. Such evidentiary evaluations fall within the the jury's purview and should not have been decided by the trial court on summary judgment. Viewing the evidence in the light most favorable to Emmerling, we conclude that a reasonable juror could find that the City terminated his

employment because of his requests for lengthy military leaves rather than because the City believed he did not initiate a sufficient number of arrests and traffic stops.

In addition to the above evidence of a material dispute over the performance evaluations, Emmerling has put forth evidence showing that supervisors involved in writing and reviewing his performance reports harbored animus against reservists. Sergeant Soqui, who authored the May 2014 critical performance evaluation, made a derogatory comment about another reservist's leave, referring to it as "vacation." And Lieutenant Oselinksy, who reviewed Emmerling's performance evaluations, referred to military leave as "gay military stuff" or "homo military stuff." A reasonable juror could infer from such remarks that Emmerling's supervisors acted with discriminatory intent when writing and reviewing his performance evaluations. As Emmerling points out, "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147.) "Pretext may be demonstrated by showing '. . . that the proffered reason had no basis in fact . . . . [Citation.]' [Citation.]" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224, fn. omitted.) Emmerling has put forth admissible evidence sufficient to support an inference that his supervisors' performance evaluations were unfairly tilted or colored against him for discriminatory reasons.

In sum, the evidence created a triable issue of material fact as to whether the Department's firing of Emmerling was motivated by his requesting and taking military leave. As illustrated by the parties' own arguments about the facts, portions of the record support Emmerling's version of events, and other parts support the City's version. But it is not this court's duty to weigh the evidence. To the contrary, we must "view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549.) A reasonable juror could find that this evidence supported an inference that the Department treated Emmerling unfavorably based on a discriminatory intent toward

reservists. The same facts and inferences provide substantial evidence that Emmerling's military leave was " 'a substantial or motivating factor' " in his termination. (*Flores v. Von Kleist, supra,* 739 F.Supp.2d at p. 1258 [applying the Military and Veterans Code].) Accordingly, we conclude the trial court erred by granting summary adjudication of the first, second, and fourth causes of action.

3. Third Cause of Action—Discrimination Based on Family Leave

Although Emmerling's briefs mostly address the claims of discrimination and retaliation based on his taking of military leave, he further contends the trial court erred by granting summary adjudication on the third cause of action (alleging retaliation for taking family leave). After reviewing the evidence, we conclude that Emmerling has not put forth substantial evidence showing the Department actually fired him for requesting and taking family leave.

First, Emmerling took and requested far less time for family leave as compared with military leave. While he took 260 hours of military leave during the 18-month probationary period, he only took only 90 hours of family leave. Second, in contrast to evidence of the Department's attitudes toward military members, Emmerling put forth no evidence that the Department was motivated by animus towards officers who took or requested family leave. We conclude no reasonable juror could find that the Department terminated Emmerling's employment for taking family leave. Therefore, the trial court did not err in granting summary adjudication on this cause of action.

III. DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting summary judgment and enter a new order granting summary adjudication of the third cause of action and denying summary adjudication of the first, second, and fourth causes of action. Costs on appeal are awarded to Emmerling.

_____
DANNER, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
GROVER, J.

Emmerling v. The City of Mountain View
H044521